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RIGHT OF FEDERAL COURT TO RESTRAIN ENFORCEMENT OF RATE REGULATION STATUTES.—AN INTERESTING OPINION BY THE SUPREME COURT OF NORTH CAROLINA, WITH REGARD TO A RATE BILL.

Questions arising between the state courts and United States courts in regard to the rate bills are productive of some very interesting questions. A very interesting question was the occasion of a difference of opinion on the part of the judges of North Carolina, which has a very able bench, in the case of the State v. Southern Ry. Co., 59 S. E. Rep. 570.

Before considering the question therein under dispute, we desire to call attention in a general way, to the situation. There seems to be a great fear on the part of the states that the extension of the federal authority over railroads, is a direct blow at the rights of the states, as sovereign states. It is true that the extension of the commerce clause of the constitution has curtailed and will curtail the authority of the states with regard to railroads, telegraph lines, ship lines, express companies, etc. Great fear is aroused that this concentration of the powers of government will proceed to such an extent, as to wipe out the lines of state jurisdiction altogether. Let us stop for a moment and consider the question from another standpoint. Our postal system is an affair which is operated by the government. It extends throughout the land ramifying the counties and townships of every state in the Union. It is protected by federal laws. Our postal system is a national affair and the general welfare of the states is best promoted by having a system of uniform laws as well as one general management to guide its operations. It is a creature of the people of the whole nation, for the whole nation, by the people of the nation, and the people are satisfied with it as it is. A very significant suggestion came from an assembly of fruit merchants, from all parts of the country, held in Chicago a few days ago. A resolution was passed by them favoring government control of the railroads. Had some of the contenders against the extension of the commerce clause, asked the reason, of one of those fruit merchants for the passage of such a resolution, he would have answered that, such a system of distribution of the general produce of the nation could be had through one system of control of these great national systems of railroads than has ever been dreamed of by the people in general.

The general welfare of the people is so greatly bound up in a uniform system of distribution of their products, that it is as certain of accomplishment in one way or another as that the night follows the day. In the meantime what should be the policy of the national and state governments, while the natural elements are working out destiny. Such conditions as gave rise to the principal case must be permitted to burn out their "ineffectual fires," as far as the growth of federal control over railroads is concerned. While matters are being adjusted to the inevitable, there are means of settling the questions which are arising, without resort to the federal authority.

In the principal case we find the federal authorities adopting means, intending to force the issue, which are on the contrary calculated to further increase whatever of estrangement or jealousy already existing between the federal and state governments. In other states, besides North Carolina, we find federal courts adopting the very unwise, if authorized, action of enjoining state officers from enforcing the criminal laws of the state, especially such laws as make it a misdemeanor to sell railroad tickets at more than the price per mile fixed by statute. The following paragraph will state briefly the situation as it arose in North Carolina:

On May 8, 1907, the defendant, Southern Railway Company, filed a bill in equity in

the Circuit Court of the United States for the Eastern District of North Carolina, on behalf of itself, as complainant, against Franklin McNeill, *et al.* for an injunction against the enforcement of said act, and on that day his honor, J. C. Pritchard, United States Circuit Judge, issued a temporary restraining order, and required the said defendants to appear before him at Asheville, on Wednesday, the 26th day of June, 1907, to show cause why an injunction *pen dente lite* should not be issued. On June 29th, after a hearing in which the jurisdiction of the circuit court was challenged by the defendants, an interlucutory injunction was granted upon the bill of complaint and the answer thereto treated as affidavits, and the cause was set down for hearing before the circuit court in the city of Asheville on the first Monday in October, 1907. In the meantime, at the July term, 1907, of Wake Superior Court, the defendant having refused and failed to obey the said statute, the grand jury indicted the defendant and its agent, for the violation of said act. At the trial of the indictment at said term, the defendant, Southern Railway Company, entered a plea to the jurisdiction of the superior court of Wake county, and put in evidence the proceedings of the Circuit Court of the United States, in which the injunction was granted. The defendant appealed and the conclusion of the State Supreme Court was to the effect that the proceeding was one that the federal court had no jurisdiction to enjoin, but held that as no criminal offense was alleged in the indictment the motion in arrest should be sustained.

We heartily agree with the North Carolina court that, the cases where the United States courts should exert their authority, as against a state court, should be of rare occurrence and that the interference in the principal case as we said in our editorial, 65 Cent. L. J. 135, was unwarranted and a wrongful invasion upon the functions of the state. We think the matter stated in Mr. Justice Harlan's opinion, to which the North Carolina court refers, aptly sets forth the true doctrine as follows: "In view of the relations existing under our present government between the judicial tribunals of the Union and of the several states, a federal court or a federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under state authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the state for determining whether he is illegally destrained of his liberty. After the highest court of the state, competent under the state law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination." Urquhart v. Brown, 205 U. S. 179.

There is no doubt in our own mind, even though the question were a closer one than it appears to be, that the general welfare is best promoted by leaving the questions first to the state courts, and then, if a grievance still be deemed to exist by either party, to take the matter thence to the Supreme Court of the United States. As to the question raised by the defendant railway company that the act was confiscatory, there is no reason why all the evidence could not be brought out in the state courts, which could be adduced in the federal courts and a review had of the whole matter in the Supreme Court of the United States. The question is well presented by Mr. Justice Walker of the North Carolina court, where he says: "Much is said in the briefs about the equity of the suit in the federal court and the complainant's right to an injunction. We would not agree with the learned judge who issued the interlocutory injunction, if that matter were strictly before us and we were required to pass upon it; for we do not think there was a sufficient disclosure of the facts, which are necessarily within the knowledge of the complainant in that suit (the defendant in this indictment), to entitle it to the favorable consideration of a chancellor. It is a very serious matter to suspend the operation of a public statute and to postpone the execution of the people's will at the instance of a private

suitor, even upon the allegation that his property is about to be confiscated, or some other constitutional right is about to be impaired; and it should not be done except upon a full disclosure of all the facts in the complainant's possession, and upon the clearest showing that the threatened injury will at least probably result."

It would be good policy on the part of federal judges to follow the action of Judge Philips who, when considering the identical question presented in this case, held that it would be impossible to decide whether the reduction of a rate will be confiscatory in the absence of an actual test of the same. The learned judge further held that whether it would be so or not was speculative and mere guesswork, and that the testimony of an ordinary business man, expressing his opinion, or even of railway experts, also giving opinions and illustrating them by the use of many figures based upon past experience, was not satisfactory, and did not relieve the doubt and uncertainty sufficiently to warrant the issuing of a preliminary injunction. Railway Co. v. Hadley (C. C.), 155 Fed. at page 225.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—ARE SUNDAY LAWS APPLICABLE TO SPECIAL TRADES UNCONSTITUTIONAL AS CLASS LEGISLATION?—Appellate courts are right now experiencing some difficulty with a species of reform legislation which might be styled "special Sunday laws," that is, laws which require those engaged in certain kinds of trade or business to suspend on Sunday. In the recent case of City of St. Louis v. DeLassus, 104 S. W. Rep. 12, the Supreme Court of Missouri wrestled valiantly with a law of this kind, in this case, an ordinance of the City of St.Louis providing that butcher shops should not open after 9 o'clock Sunday morning. The question in this case was whether this ordinance by directing its fiat exclusively at butcher shops was not class legislation, especially in view of the position of the Missouri Supreme Court in the case of State v. Granneman, 132 Mo. 326, 33 S. W. Rep. 784, holding void an act of the legislature requiring barber shops to be closed on Sunday.

The question as above stated is further complicated by the fact that there was in force at the time this ordinance was passed, a general law requiring all business to be suspended on Sunday except the sale of "drugs, or other articles of immediate necessity." In holding the ordinance in this case not to be in necessary conflict with this statute, the court argued that proper exceptions could always be made to the operation of any general law without making the things or persons excepted the necessary objects of class legislation, provided the exceptions so made were founded in reason and on distinctions "not purely arbitrary." The general law excepted "articles of immediate necessity," and left it to the courts to determine what articles such exception might include. In order, then, to show that the municipal assembly of St. Louis, which had authority to pass such an ordinance which would not be in conflict with the general rule merely put a statutory construction on the term "articles of immediate necessity" by including the sale of meats up to a certain hour the court makes the following interesting argument: "When the municipal assembly came to the consideration of this statute as applied to the conditions of a great and populous city, doubtless it was confronted with the question: What were and are acts of necessity and charity? And it must have occurred to that body that thousands of persons were and are dependent for their supply of meats, particularly fresh meats, upon the retail meat shops, and that thousands of them in all probability were not provided with refrigerators or cold storage in which to keep fresh meat, purchased on Saturday, fit for food on Sunday, especially during the hot weather. Accordingly, it was deemed proper and wise to declare and enact by a general provision that the sale of meat up to 9 o'clock in the forenoon on Sunday should be considered an act of immediate necessity, and thus relieve the vendors or proprietors of these meat shops of the burden of showing in each individual instance that the furnishing of meat to a family on Sunday morning up to 9 o'clock was an act of immediate necessity. Not only is this provision of the ordinance in question not adverse class or special legislation against the owners of these shops, but it is more properly a special dispensation in their favor, hurtful to no one, but a wise discrimination in favor of thousands of families who are dependent for their supply of meat upon these meat shops, and in no sense arbitrary."

When, however, the court attempts to reconcile the decision in the principal case with its former decision in the case of State v. Granneman, supra, the question whether it succeeded in so doing, is quite doubtful. If the legislature or a municipal assembly can by further legislation positively define the phrase "articles of immediate necessity" by specifying what

particular articles shall be so considered and to what extent, why may it not also negatively define the same phrase in the general law by specifying what particular articles shall not be considered "articles of immediate necessity." Or even if the courts have by a line of decision held a certain kind of trade or business, one of "immediate necessity" may not the legislature, in the exercise of the police power of the state say that other considerations of paramount importance to the state make the suspension of even such a business on Sunday necessary to the general welfare? This question has been raised in other jurisdictions, especially as to laws requiring barber shops to close on Sunday, and such legislation has been held constitutional both in the state courts and by the Supreme Court of the United States, on the ground that it was competent for the legislature to take cognizance that barbers ordinarily work a greater number of hours each day than other laborers and are compelled to stand on their feet all the time in performing their duties. State v. Nichols, 28 Wash. 628, 69 Pac. Rep. 372; State v. Petit, 74 Minn. 376, 77 N. W. Rep. 225; Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. Rep. 666, 44 L. Ed. 716; Ex parte Northrup, 41 Or. 489, 69 Pac. Rep. 445. On the other hand, the Supreme Court of Illinois, in Eden v. People, 161 Ill. 296, 43 N. E. Rep. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365, the Supreme Court of Missouri in State v. Granneman, 132 Mo. 326, and the Supreme Court of California, in Ex parte Jentzsch, 112 Cal. 468, 44 Pac. Rep. 803, 32 L. R. A. 664, have adjudged such acts unconstitutional, on the ground that it is special legislation.

THE CONSTITUTIONALITY OF STATE LEGISLATION REQUIRING TELEGRAPH COMPANIES TO TRANSMIT MESSAGES PROMPTLY AND TO DELIVER WITHIN CERTAIN LIMITS.

This is a question of considerable importance as many of the state legislatures have passed acts, all more or less alike, requiring telegraph companies to serve all alike and requiring them to transmit messages in the order of time in which they are filed, with certain exceptions such as newspaper articles, etc., and requiring them to deliver within certain limits, usually within one mile of the office, and providing for a penalty of from $50.00 to $100.00 in case of failure to perform. By the general law of the land, telegraph companies were and are liable for any and all damage occasioned by their negligence, but this is far from a satisfactory rule, for under that law one can only recover the amount of damages which he is able to prove. This is very satisfactory where actual money damages have resulted, but where mere inconvenience or anxiety resulted without any money loss, nothing can be recovered; and so telegraph companies, which are *quasi* public corporations and which are under obligations to serve the public honestly and with care and diligence and which are granted many privileges that the individual does not enjoy, can, with impunity, neglect and wholly fail to transmit messages, where from the nature of the message no money damage is liable to result, and be liable for nothing at all except nominal damages. So, in many cases, possibly 50 per cent of them, no adequate remedy would be at hand under the general law to procure redress for a failure on the part of a telegraph company to transmit a message with care and diligence. So, although the people give the companies many extraordinary powers and privileges, such as the power of eminent domain, etc., they, under the general law, are left without any means, in many cases, of compelling the companies to serve them in turn. To provide for this deficiency, and deficiency it is, in the law, many states have passed acts of the nature above referred to requiring telegraph companies to respond in damages in a given sum in case of a wilful failure or, in many cases of a neglect, to serve. This specified penalty is in the nature of liquidated damages and is payable to the aggrieved party. The law presumes that upon the wilful or negligent failure of a telegraph company to perform its duty to the public, damage results and places it at a specified amount which can be recovered by suit; or, in case he can prove damages in excess of the statutory penalty, he may waive the statute and sue under the general law and recover whatsoever amount of damages he is able to prove.[1] Or he may waive any special damage he may have sustained and sue for the statutory penalty.[2] It is held in Western Union Telegraph Co. v. Pendleton,[3] and the cases there cited that the

[1] Western Union Tel. Co. v. Ferguson, 157 Ind. 37, 40.

[2] Western Union Tel. Co. v. James, 162 U. S. 651, 16 Sup. Ct. Rep. 934.

[3] 95 Ind. 12, 18.

amount recoverable is not liquidated damages, payable to the aggrieved party for the breach of a contract, but is a penalty, although the right of action is founded upon a contract, while in Western Union Telegraph Co. v. Ferguson,[4] the amount recoverable is held to be punitive damages. Most of the states provide that the penalty shall be recoverable by the aggrieved party and the decisions hold that the aggrieved party is the sender.[5] The Georgia statute provides that the penalty is recoverable by either the sender or the party to whom the message is addressed and provides that it is recoverable by the party who first sues. Under this statute the party to whom it is addressed is held to be a proper party to bring the suit.[6] While there is some conflict among the decisions as to whether or not telegraph companies are common carriers, it seems to be established, and no doubt correctly, that they are instruments of commerce and that messages are a part of commerce.[7] In Telegraph Co. v. Texas,[8] it was decided that intercourse by telegraph between the states is interstate commerce. Its language was: "A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in many respects different, but they are, both indispensable to those engaged to any considerable extent in commercial pursuits." So, we are met at the outset with the question as to whether or not these regulations, in so far as they affect interstate business, are not an interference with interstate commerce and in conflict with Article 1, Section 8, of the federal constitution, which provides that congress shall have power to regulate interstate commerce. There are decisions which hold that any state legislation which in any way affects interstate commerce is in conflict with the commercial clause in our federal constitution, but this is not the accepted doctrine and the generally accepted rule is, that where congress has failed to exercise its right to legislate and control, in regard to matters which are not necessarily national in their character and in which uniformity of rule is not necessary, that in these cases the states may legislate; the states have the power, at least in the absence of congressional legislation on the subject, to clear and dredge rivers and improve harbors, etc., although they are more or less closely connected with interstate commerce and commerce between nations.[9] It is not always necessary or desirable that regulation of matters and things that in one way or another may affect commerce should be uniform. In many instances provisions and regulations of instruments and means are best left in the control of the different localities. It was said in Cooley v. Board of Wardens of the Port of Philadelphia,[10] that, "it manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states and of the national government has been in conformity with this declaration from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity of different systems of regulation, drawn from local knowledge and experience and conformed to local wants." It was said in County of Mobile v. Kimball,[11] that, "buoys and beacons are important aids, and sometimes are essential to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by congress is undoubtedly within its commercial power. But it would be extending that power to the exclusion of state authority to an unreasonable degree to hold that whilst it remained unexercised upon this subject, it would be unlawful for the state to provide the buoys and beacons required for the safe navigation of its harbors and rivers and in case of their

[4] 157 Ind. 37, 40, 41.

[5] Western Union Tel. Co. v. Pendleton, 95 Ind. 12; Dickson v. Reuter's Tel. Co., L. R. 2 C. P. D. 62; Playford v. U. K. Tel. Co., L. R. 4 Q. B. 706.

[6] Western Union Tel. Co. v. James, 162 U. S. 651, 16 Sup. Ct. Rep. 934.

[7] Western Union Tel. Co. v. James, 162 U. S. 651, 16 Sup. Ct. Rep. 934; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1; Tel. Co. v. Texas, 105 U. S. 460; Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. Rep. 1126.

[8] 105 U. S. 460, cited above.

[9] County of Mobile v. Kimball, 102 U. S. 691.

[10] 12 How. 299, 320.

[11] 102 U. S. 691, 698.

destruction by storms or otherwise it could not temporarily supply their places until congress could act in the matter and provide for their re-establishment. That power which every state possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health, and property of its people, would justify measures of this kind. The uniformity of commercial regulations, which the grant to congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been anticipated. State action upon such subjects can constitute no interference with the commercial power of congress, for when that acts the state authority is superseded. Inaction by congress upon these subjects of a local nature or operation, unlike its inaction upon matter affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority." In Willson v. Blackbird Creek Marsh Company,[12] a law of Delaware authorizing the construction of a bridge over one of its small navigable streams, which obstructed the navigation of the stream, was held not to be repugnant to the commercial power of congress. The court, Chief Justice Marshall delivering its opinion, placed its decision entirely upon the absence of any congressional legislation upon the subject. Its language was: "If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states,—we should not feel under difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnance to the power to regulate commerce with foreign nations and among the several states,—a power which has not been so exercised as to affect the question." In regard to those matters relating to commerce which are not of a nature to be affected by locality, but which necessarily ought to be the same over the whole country, it has been frequently held that the silence of congress upon such a subject, over which it had unquestioned jurisdiction, was equivalent to a declaration that in those respects commerce should be free, and unregulated by any state enactment.[13] The matters upon which the silence of congress is equivalent to affirmative legislation are national in their character, and such as to fairly require uniformity of regulation upon the subject matter involved affecting all the states alike.[14] In Covington & C. Bridge Co. v. Kentucky,[15] Mr. Justice Brown in delivering the opinion of the court said: "The adjudications of this court with respect to the power of the state over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by congress; third, those in which the action of congress is exclusive, and the state cannot interfere at all." In Covington & C. Bridge Co. v. Kentucky,[16] are cited many cases as coming within the second class, among which are laws for the regulation of pilots, for quarantine and inspection, for policing harbors, improving navigable channels, regulating wharves, piers, and docks, constructing dams and bridges across navigable waters of the state, and also laws for the establishment of ferries. In relation to the power of congress to regulate commerce in cases of the second class, it is said that it is not its mere existence, but its exercise by congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations.[17] A state statute was held valid in Smith v. Alabama,[18] which provided for an examination of engineers of

[12] 2 Pet. 245, 252.

[13] Welton v. State, 91 U. S. 275, 282; Hall v. DeCuir, 95 U. S. 485, 490.

[14] County of Mobile v. Kimball, 102 U. S. 691.

[15] 154 U. S. 204, 14 Sup. Ct. Rep. 1087.

[16] *Supra.*

[17] Sturges v. Crowninshield, 4 Wheat. 122, 193.

[18] 124 U. S. 465, 8 Sup. Ct. Rep. 564.

locomotives by a state board of examiners, and it was applied to an engineer engaged in running a locomotive on one continuous trip rom Mobile in Alabama to Corinth in Mississippi. It was held to be a valid police regulation. Legislation which is a mere aid to commerce may be enacted by a state, although at the same time it may incidentally affect commerce itself.[19]

So much to show that under the decisions the states may legislate in certain instances in reference to interstate commerce. Now in reference to the question as to whether or not they may legislate in reference to the telegraph business, a particular phase of interstate commerce. Since the decision of our federal supreme court in Western Union Telegraph Co. v. Pendleton,[20] which is a pioneer case in the effect of its decision, it is held that a state legislature cannot impose a penalty for a failure to deliver in another state. The message, in this case, was left at Shelbyville, Indiana, and addressed to a person at Ottumwa, Iowa, and the statute provided for a penalty of $100.00 for a failure to deliver promptly within a mile limit. The message was not delivered until the next morning, it having arrived at Ottumwa at 7:30 in the evening. It was then delivered by mail, although the party to whom it was addressed lived within one hundred feet of the telegraph station at that place. The court said that as the object of vesting the power to regulate commerce in congress was to secure uniformity of rule and action that the provisions of the statute in reference to delivery within another state could not be enforced as this would inevitably lead to confusion as the different states might well and would be likely to have conflicting legislation in reference to delivery. The statute of the state from which the message was sent might require certain actions under certain penalties and the state to which it was sent might have other provisions with reference to delivery, and a different penalty be provided; this being true, chaos would result, the opposite of what is desired. This stands as the law today on that question. In Western Union Telegraph Co. v. James,[21] it is decided that the party to whom a message is addressed may bring a suit for the statutory penalty for a failure to deliver promptly a message sent from another state under the Georgia statute, which provided that the party addressed might bring the action. The court held that the act was an aid to commerce and not a hindrance and that at least so long as congress had not legislated upon the subject, that the states were free to act. The court held that there was no tax levied nor the penalty prohibitive. It expressly said that it would not attempt to say that a higher penalty might not have the effect of making an act unconstitutional, but said that it regarded the penalty of $100.00 provided for by the statute as being within reason. The court in the course of its opinion said: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing the general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the federal constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that in regard to such a message as the one in question, although it comes from a place without the state, is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery), at least so far as legislation of the state tends to enforce the performance of the duty owed by the company under the general law. So long as congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature

[19] County of Mobile v. Kimball, 102 U. S. 691.
[20] 122 U. S. 347, 7 Sup. Ct. Rep. 1126.
[21] 162 U. S. 651, 16 Sup. Ct. Rep. 934.

of this Georgia statute. It is not a case where the silence of congress is equivalent to an express enactment. As has been said, this statute levies no tax and seeks no revenue from the company by reason of these interstate messages." The court distinguished the case above from the Gloucester Ferry Co. v. State,[22] which was an attempt to tax persons or property shipped from one state into another and said such legislation was bad whether or not congress had passed any act upon the subject; while in the James case there was no attempt on the part of the Georgia statute to levy a tax or to compel the company to do anything they were not already under obligation to do under the general law. The court said that while it was important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. They held the statute in question one of that class and said that in the absence of congressional legislation, the statute was a valid exercise of the power of the state over the subject.

The question which next presents itself is whether or not a state statute is constitutional which provides for the recovery of a penalty for a failure to transmit at all. The latest and clearest expression of a supreme court upon the question is Postal Telegraph Co. v. Umstadter.[23] There a suit was brought to recover a penalty of $100.00 for a failure on the part of the company to transmit a message from Norfolk, Virginia, to a person in the state of New York; the court after distinguishing it from the Pendleton case,[24] based its decision upon the ruling in the case of Western Union Telegraph Co. v. James,[25] and held that it was not an interference with interstate commerce, nor did the statute attempt to levy a tax upon interstate business, nor did it require the company to do anything that they were not already under obligation to do, namely to transmit all proper messages, but was merely an exercise of the police power of the state to compel the company, under a penalty, to serve all citizens alike. It would seem to be clear that a provision which imposes a penalty for a violation of a general duty to transmit is no more a regulation of interstate commerce than a statute which imposes a penalty for a failure to deliver. The provision in question in the Virginia statute can, as was said of the provision in the Georgia statute, "be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence, until congress speaks upon the subject, it would seem that such a statute must be valid." "It cannot be doubted," says Judge Cooley in his work on constitutional limitations (6th Ed.),p. 715, and his statement is quoted with approval by the Supreme Court of the United States in Lake Shore, etc., R. Co. v. Ohio, etc.,[26] "that there is ample power in the legislative department of the state to adopt all necessary legislation for the purpose of enforcing the obligations of the railway companies, as carriers of persons and goods, to accommodate the public impartially, and to make reasonable provision for carrying with safety and expedition." The same power must exist as to telegraph companies, for they exercise a public employment, and are bound to serve all customers alike, without discrimination.[27] It seems to be clear then, that under the ruling of the Supreme Court of the United States and also of the highest tribunals of the states, that, at least so long as congress fails to legislate upon the subject, the provisions of the state statutes, providing penalties for a failure to deliver, within the state, and for a failure to transmit, are enforceable, even though they do affect interstate commerce.

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[22] 114 U. S. 196, 5 Sup. Ct. Rep. 826.
[23] 50 S. E. Rep. 259.
[24] *Supra.*
[25] *Supra.*
[26] 173 U. S. 285, 297, 19 Sup. Ct. Rep. 465, 470.
[27] Primrose v. Western Union Tel. Co., 154 U. S. 14, 14 Sup. Ct. Rep. 1098

CONSTITUTIONAL LAW—STATUTE PROHIBITING NON-RESIDENT'S CAUSE OF ACTION BASED ON FOREIGN STATUTE.

CHAMBERS v. BALTIMORE & OHIO RAILROAD COMPANY.

United States Supreme Court, November 18, 1907.

The privileges and immunities of citizens in the several states, secured, by U. S. Const., art 4, sec. 2, par. 1, to the citizens of each state, are not denied by the provision of an Ohio statute under which, as construed by the highest court of that state, the right of action created by Pa. Act of April 15, 1851, p. 674, sec. 19, in favor of the widow or personal representatives of one whose death is caused by negligence, can be maintained in the Ohio courts only when the deceased was an Ohio citizen.

Mr. Justice Moody delivered the opinion of the court:

This is a writ of error directed to the supreme court of the State of Ohio. The plaintiff in error is the widow of Henry E. Chambers, who, while in the employ of the defendant in error as a locomotive engineer, and engaged in the performance of his duty, received injuries from which he shortly afterwards died. Both husband and wife were, at the time of the injuries and death, citizens of Pennsylvania, and the wife has since continued to be such. The injuries and death occurred in Pennsylvania. The widow brought an action in the court of common pleas of the State of Ohio against the defendant railroad, alleging that the injuries were caused by its negligence. In that action she sought to recover damages under certain parts of the constitution and laws of Pennsylvania printed in the margin,* which provided for the recovery of damages for death. The plaintiff had a verdict and judgment in the court of common pleas, from which, by petition in error, the case was removed first to an intermediate court and then to the supreme court of the state. There is was insisted by the defendant that the action could not be maintained in the courts of Ohio. The supreme court sustained this contention, reversed the judgments of the court below, and entered judgment for the defendant. A statute of Ohio provided that "whenever the death of a citizen of this state has been or may be caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory, or foreign country." (Bates, Anno. Stat. § 6134a.) There was no other statutory provision on the subject. The supreme court held that the action authorized by this statute for a death occurring in another state was only when the death was that of a citizen of Ohio; that the common law of the state forbade such action; and that, as the person for whose death damages were demanded in this case was not a citizen of Ohio, the action would not lie. The plaintiff brings the case here on writ of error, alleging that the statute thus construed and the judgment based upon that construction violate article 4, § 2, paragraph 1, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This allegation presents the only question for our consideration.

The defendant objects to our jurisdiction to re-examine the judgment because the federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the supreme court that the federal question was assumed to be in issue, was decided against the claim of federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error. San Jose Land & Water Co. v. San Jose Ranch Co., 189 U S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. Ed. 490, 27 Sup. Ct. Rep. 281.

In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force.

*Sections 18 and 19 of the act of April 15, 1851, are as follows: "Sec. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction." "Sec. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Sections 1 and 2 of the act of April 26, 1855, are as follows: "Sec. 1. The persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." "Sec. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter." By sec. 21, article 3, of the constitution of the State of Pennsylvania of 1874, it is provided as follows, to-wit: "Sec. 21. No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from such injuries the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted."

In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal constitution. Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, per Washington, J.; Ward v. Maryland, 12 Wall. 418, 430, 20 L. Ed. 449, 452, per Clifford, J.; Cole v. Cunningham, 133 U. S. 107, 114, 33 L. Ed. 538, 542, 10 Sup. Ct. Rep. 269, per Fuller, Ch. J.; Blake v. McClung, 172 U. S. 239, 252, 43 L. Ed. 432, 437, 19 Sup. Ct. Rep. 165, per Harlan, J.

But, subject to the restrictions of the federal constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.

The law of Ohio must be brought to the test of these fundamental principles. It appears from the decision under review (and we need no other authority) that, by the common law of the state, the courts had no jurisdiction to entertain actions to recover damages for death where the cause of action arose under the laws of other states or countries. This rule was universal in its application. The citizenship of the persons who brought action or of the person for whose death a remedy was sought was immaterial. If the death was caused outside the state and the right of action arose under laws foreign to the state, its courts were impartially closed to all persons seeking a remedy, enirely irrespective of their citizenship. The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the courts were given jurisdiction over certain actions of this description while the common law was left to control all others. A discrimination was thus introduced into the law of the state. The discrimination was based solely on the citizenship of the deceased. The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the constitution.

But it may be urged, on the other hand, that the conformity is only superficial; that the death action may be given by the foreign law to the person killed, at the instant when he was vivus et mortuus, and made to survive and pass to his representatives (Higgins v. Central New England & W. R. Co., 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. Rep. 534); that in such cases it is the right of action of the deceased which is brought into court by those who have it by survivorship; and that, as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another state, there is, in a real and substantial sense, a discrimination forbidden by the constitution.

If such a case should arise, and be denied hearing in the Ohio courts by the Ohio law, then, as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not, in substance, grant privileges to Ohio citizens which it withheld from citizens of other states. But no such case is before us. The Pennsylvania statute which created the right of action sought to be enforced in the Ohio courts has been construed by the courts of Pennsylvania. The applicable section is § 19 of the act of 1851. Of it the Pennsylvania court said in Fink v. Garman, 40 Pa. 95:

"The 18th section was apparently intended to regulate a common-law right of action by securing to it survivorship; but the 19th section was creative of a new cause of action, wholly unknown to the common law. And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representatives. It was not survivorship of the cause of action which the legislature meant to provide for by this section, but the creation of an original cause of action in favor of a surviving widow or personal representative."

This is the settled interpretation of the act.

Mann v. Weiand, 81 Pa. 243; Pennsylvania R. Co. v. Bock, 93 Pa. 427; Eagles' Estate, 21 Pa. Co. Ct. Rep. 229; McCafferty v. Pennsylvania R. Co., 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. Rep. 435. It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that state, but because the cause of action which she presents is not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. We are unable to see that in this case the plaintiff has been refused any right which the constitution of the United States canfers upon her, and accordingly the judgment is affirmed.

Note.—Right of a State to Refuse to Entertain Suit for Wrongful Death Unless Decedent Was a Citizen of Said State.—No annotation of this case is necessary beyond the strong dissenting opinion of Justice Harlan, concurred in by Justices White and McKenna. That the supreme court in this case has made a serious mistake seems almost conclusive, from even a cursory reading of Justice Harlan's clear and incisive argument. Justice Harlan says in part:

"It appear that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that state, take cognizance of an action for damages on account of death occurring in another state and caused by wrongful act, neglect, or default, except where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed by its statute against any suit for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the state where the death occurred, the widow or estate of each decedent would have, in the latter state, a valid cause of action.

Is a state enactment having such effect repugnant to the clause of the federal constitution, art. 4, sec. 2, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states?" Will not that constitutional guaranty be shorn of much of its value if any state can reserve, either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are the same, it denies to citizens or to the estates of citizens of other states?

It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I cordially assent to what is said upon this point in the opinion just delivered for the majority of the court. The opinion says: 'In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal constitution. . . . The privileges which it (the state) affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.'

The supreme court of Ohio, it will be observed, does not base its judgment upon any common law of the state apart from its statutes. It says: 'From a consideration of the statutes hereinbefore referred to, and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this state that an action for wrongful death occurring in another state will not be enforced in the courts of this state, except where the person killed was, at the time of his death, a citizen of Ohio.' It places its judgment on its statutes and judicial decisions, which it regards as together indicating the policy and law of the state to be such as to preclude an action for damages, except where the deceased was a citizen of Ohio. That exception, upon whatever basis it may be rested, must fall before the constitution of the United States and be treated as a nullity. The denial to the widow or representative of Chambers of the right to sue in Ohio, upon the ground that he was not a citizen of Ohio, when killed, was the denial, in every essential sense, of a fundamental privilege belonging to him under the constitution, in virtue of his being a citizen of one of the states of the Union—the right to sue and defend in the courts of justice which right this court concedes to be 'one of the highest and most essential privileges of citizenship.' While in life Chambers enjoyed the right—and it was a most valuable right—of such protection as came from the rule established in Pennsylvania, that, in case of his death in consequence of the negligence of others, the wrong done to the deceased in his lifetime could be remedied by means of suit brought in the name and for the benefit of his widow or personal representative. But Ohio takes this right of protection from him; for the Ohio court would have taken cognizance of this action if the decedent, Chambers, had been when killed, a citizen of Ohio, while it denies relief to his widow, and puts her out of court solely because her husband was, when killed, a citizen of another state. It thus accords to the Ohio widow of a deceased Ohio citizen a privilege which it withholds from the Pennsylvania widow of a deceased Pennsylvania citizen. If the statutes of Ohio had excluded from the jurisdiction of the courts of that state all actions for

damages on account of death, a different question would be presented. But that is not what Ohio has assumed to do. As already shown, it allows suits for damages like the present one, where the death occurred in another state, provided the deceased was a citizen of Ohio, but prohibits them where he was a citizen of some other state. The final judgment in this case therefore denies a fundamental right inhering in citizenship, and protected by sec. 2 of article 4 of the constitution. The constitution is the supreme law of the land. But it would not be supreme if any right given by it could be overridden either by state enactment or by judicial decision. The statute of Pennsylvania which gave the plaintiff, as widow of the deceased, a right to sue for damages, does not offend natural justice or good morals, nor is it calculated to injure the citizens of any state, not even those of Ohio, nor can it be said to offend any policy of that state which has been made applicable equally to its own citizens and citizens of other states. The case is plainly one in which Ohio attempts, in reference to certain kinds of actions that are maintainable in perhaps every state of the Union, including Ohio, to give to its own citizens privileges which it denies, under like circumstances, to citizens of other states. To a citizen of Ohio it says: "If you go into Pennsylvania, and are killed while there, in consequence of the negligence or default of someone, your widow may have access to the Ohio courts in a suit for damages, provided the wrongdoer can be reached in Ohio by service of process." But to the citizen of Pennsylvania it says: "If you come to your death in that state by reason of the negligence or default of someone, even if the wrongdoer be a citizen of Ohio, your widow shall not sue the Ohio wrongdoer in an Ohio court for damages, because, and only because, you are a citizen of another state." This is an illegal discrimination against living citizens of other states, and the difficulty is not met by the suggestion that no discrimination is made against the widow of the deceased because of her citizenship in another state. The statute of Pennsylvania in question had in view the protection of persons, while alive, against negligence or default causing death. It must have had that object in view. I submit that no state can authorize its courts to deny or disregard the constitutional guaranty that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

JETSAM AND FLOTSAM.

JUSTICE HARLAN'S VIEWS ON THE PRESENT CONFLICT BETWEEN STATE AND FEDERAL JURISDICTIONS.

The best friends of state rights, permit me to say, are not those who habitually denounce as illegal everything done by the general government, but those who recognize the government of the Union as possessing all the powers granted to it in the constitution, either expressly or by necessary implication; for, without a general government possessing controlling power in relation to matters of national concern, the states would have no prestige before the world and would be in perpetual conflict with one another. With equal truth, it may be said, that the best friends of the Union are those who hold that the states possess all governmental powers not granted to the general government, and that are not inconsistent with their own constitutions or with the constitution of the United States or with a republican form of government. The people of the United States cherish, and will compel adherence to, the fundamental doctrine that the states are vital parts of the American system of government; and they will insist with no less determination upon the recognition of the just powers of the states—to be exerted always in subordination to the supreme law of the land—as essential to the preservation of our liberties. The Supreme Court of the United States has again and again declared, upon full consideration, that a close and firm union is necessary for the happiness of the American people, and that "without the states in union there could be no such political body as the United States."

If then the matchless government devised by the fathers and ordained by the people of the United States is to be preserved and handed down intact to posterity, national power and state power must go hand in hand in harmony with the constitution. If those powers clash, the paramount authority of the Union within its prescribed sphere of action must prevail. Such is the express mandate of the constitution, and such our common sense and experience tell us must always be the case, if liberty regulated by law is not to perish from our land. The nation being supreme within the sphere of its action as defined by the constitution, its authority, when legally exerted, binds every state as well as all individuals within the territory of the United States. The glory of the republic is that its affairs are regulated by a written constitution—the fundamental law which distributes the powers of government among three separate, co-equal and co-ordinate departments, each exerting the authority, and only the authority, conferred upon it—and which constitution, until amended in the mode prescribed by itself, must be deemed supreme over the congress, over the president, over the courts, over the states and over the people themselves.

The pessimist is misled by the declaration of some happily few in number, who hold that whatever the words of the constitution that instrument should be so construed as to make it mean what a majority of the people think, at a given time, it should mean. He is also misled by the theory advanced by those who hold that congress must be permitted to exert any governmental power whatsoever, not expressly denied to it, if that body deems that its exercise will promote "the general welfare." But such theories of constitutional construction find no support in judicial decisions or in sound reason, least of all in the final judgments of that tribunal whose greatest function it is to declare the meaning and scope of the fundamental law. The national government, it should ever be remembered, is one of limited, delegated powers, and is not a pure democracy, in which the will of a popular majority as expressed at the polls at a particular time becomes immediately the supreme law. It is a representative republic, in which the will of the people is to be ascertained in a prescribed mode, and carried into effect only by appointed agents designated by the people themselves, in the manner indicated by law. It would be a calamity unspeakable if our institutions and the sacred rights of life, liberty and property should be put at the mercy of a majority unrestrained by a written supreme law binding every department of government, even the people themselves. The pessimist—indeed all—may take courage in the fact that it has become a recognized rule of construction that the constitution is to be taken as meaning what its words in their natural, obvious sense import, and, if the people desire it to mean something different, that instrument must be amended in the manner, and only in the manner, prescribed by itself. The dispute among statesmen has not been so much in reference to the general principles that should govern constitutional construction as to the application of those principles in determining the extent of the powers granted to the national government. Early in the history of the nation some insisted upon a narrow, literal interpretation of the constitution which, had it been approved, would have made the general government a rope of sand, wholly inadequate to the great purposes for which it was established. But long ago that view was rejected by the Supreme Court of the United

States, and its rejection has been universally approved.

There are some who would deny to congress all powers that are not, in words, specified in the constitution as belonging to the legislative branch of the government. They would eliminate altogether from our jurisprudence the long-established doctrine that congress may exercise powers that are plainly incidental to those expressly granted and not prohibited by the constitution, that is, powers necessarily implied because embraced by those enumerated, and without which the government would be unequal to the objections for which it was avowedly established and would become, to use the words of Marshall, "a splendid bauble."

It is true that national power, as now exerted, covers a wider field of action than it did in early days of the republic; but that does not prove, as the pessimist would have us think, that the government has usurped powers that do not belong to it and has entered the domain reserved by and for the states. It proves only that the nation has from time to time, as the public interests demanded, brought into active operation powers which congress had not previously chosen to exert. So vast has been the increase in our population and so diversified and extended have become our industrial interests, that occasions must necessarily arise, from time to time, for a more intimate connection between the government of the union and the commercial and other affairs of the people than perhaps the fathers ever dreamed of. Hence, if modern problems, as connected with the operations of government, are to be solved in the interest and for the benefit of the people, and if the nation is to keep abreast with advancing civilization, new fields of legislation must be occupied. While new legislation must always be closely scrutinized and care be taken that it is not inconsistent with the constitution, we must not be so unwise or suspicious or timid as to reject a new policy or a new law simply because it is new, or simply because it may cover areas not consciously within the mental vision or the thoughts of the framers of the constitution. That wonderful instrument, the supreme court has said, was intended "to be adapted to the crises of human affairs." The wise men of the constitutional period deemed it unnecessary to go further than to specify the general objects to be accomplished by the national government, and to enumerate the powers that may be exerted by it, leaving to congress—under its responsibility to the people and under its authority to pass such laws as were necessary and proper to carry into effect the powers enumerated and granted—to employ such means not expressly or impliedly prohibited as are appropriate to the particular object designed to be accomplished. The supreme judicial tribunal of the nation has spoken with distinctness upon this point. Its words, in a great case—all its members concurring—are: "The constitution unavoidably dealt in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of powers, as its own wisdom, and the public interests, should require." Thus, was the nation armed with authority to meet new conditions that might arise, and which permitted or required governmental action. Is a proposed new law embraced by any general power granted? Has it any reasonable connection with the specified objects, or any of them, to which under the constitution, the power of the nation extends? If these questions be answered in the affirmative, then it will only remain for the law-making department of the government to determine whether the proposed law will be conducive to the public welfare. And that determination will not be one of law, but simply one of policy. Granted the power to legislate in reference to a particular matter, congress can employ any means, not forbidden nor inconsistent with the constitution, that may be germane to the end proposed to be accomplished.

Therefore let the country gather up all the strength that comes from the patriotism and loyalty of the American people and go forward in its marvelous career, holding to the confident belief, justified by the words of the constitution and by judicial decisions, that the checks in our governmental system will suffice in the future, as they have sufficed in the past, to guard our institutions against insidious attacks upon the fundamental principles of free government, or against the exercise of arbitrary or usurped power. Keeping within the scope and broad lines of the constitution we may walk safely and without fear. We need not hesitate to build on the foundations laid by the forefathers. Those foundations are broad and deep, and so long as new measures and policies are tested by the plumb line of the constitution and we keep well within its wise limitations, we may safely rear whatever superstructure our welfare and greatness as a nation may require.

Let us then move on in the "old paths, where is the good way" marked out by the fathers. Let us not give our approval to any interpretation of the constitution that will either cripple the nation's authority or prostrate the nation at the feet of the states, or that will deprive the states of their just powers. Let us hold fast to the broad and liberal, and yet safe, rules of constitutional construction approved by the fathers and established by judicial decisions. In so doing we will sustain our dual system, under which the government of the union is forbidden to exercise any power not granted to it expressly or by necessary implication, while the states will not be hindered or fettered in the exercise of powers that have not been surrendered by them to the Union, and are not inconsistent with the constitution.

Remarks of Mr. Justice Harlan at the Kentucky Society Banquet in New York, December 23, 1907.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abatement and Revival** — Action to Rescind Transfer of Property.—The right of action to rescind a transfer of property and demand an accounting on account of fraud and undue influence survives to the personal representative.—Borchert v. Borchert, Wis., 113 N. W. Rep. 35.

2. **Acknowledgment** — Married Women. — An officer's certificate of acknowledgment and privy examination of a married woman precludes inquiry as to fraud duress, or undue influence of the treaty not participated in by the grantee or his agent, or in the privy examination, unless no examination was had and she refused, before the officer, to assent.—Johnson Lumber Co. v. Leonard, N. C., 59 S. E. Rep. 134.

3.——Notary's Certificate.—A notary's certificate of acknowledgment of a deed executed in a sister state held one instrument, rendering the fact that his seal was placed between parts thereof immaterial.—Bernheim v. Heyman, Ky., 104 S. W. Rep. 388.

4. **Adverse Possession** — Recorded Deeds.—which have been recorded are proper to be considered in connection with the acts of grantees in determining whether their possession of the premises was adverse.—Godfrey v. Dixon Power Lighting Co., Ill., 81 N. E. Rep. 1089.

5.——What Constitutes.—Possession for seven years under color of title, to bar the entry of one shown to be or to have been the real owner must be continuous, uninterrupted and manifested by distinct and unequivocal acts of ownership.—Bland v. Beasley, N. C., 58 S. E. Rep. 993.

6. **Appeal and Error**—Certification of Evidence by Stenographer.—Testimony transcribed by stenographer and improperly certified held not to be considered on appeal where there is no evidence to show that it was filed as a part of the record nor authentication in a bill of exceptions.—Murphy v. Citizens' Bank of Junction City, Ark., 104 S. W. Rep. 187.

7.——Credibility of Witness. — Where the question is simply one of credibility of witnesses the appellate court will not interfere with the verdict merely because the jury did not accept the conclusion of experts.—Commonwealth Life Ins. Co. v. Dixon, Ky., 104 S. W. Rep. 355.

8.——Directed Verdict.—Where both parties moved for a directed verdict, and the court overruled one motion and granted the other, the action of the court will be sustained, unless there are no facts on which to base it.—Larson v. Calder, N. D., 113 N. W. Rep. 103.

9.——Direction of Verdict.—A party against whom a verdict was directed is entitled to the most favorable inferences from the evidence, and all contested facts must be treated as established in his favor.—Strong v. Rutland R. Co., 106 N. Y. Supp. 85.

10.——Effect of Reversal of Decree.—Reversal of decree of orphans' court sustaining liability of deceased trustee's estate for loss of trust funds causes reversal of subsequent decree requiring representatives of such trustee to pay over the award.—In re Graham's Estate, Pa., 67 Atl. Rep. 462.

11.——Harmless Error.—Where, in an action on a fire policy, there was an issue whether a cash book had been delivered to the insurer, as required by the policy, an instruction held not prejudicial to the insurer.—McMillan v. Insurance Co. of North America, S. Car., 58 S. E. Rep. 1020.

12.——Joint Tort Feasors.—One tort feasor in whose favor a verdict is rendered is not a party to a judgment rendered against the other tort feasor, and he need not join in an appeal therefrom.—Indianapolis Traction & Terminal Co. v. Holtsclaw, Ind., 81 N. E. Rep. 1084.

13.——Motion for Directed Verdict.—A motion for a directed verdict at the close of plaintiff's evidence, if overruled, must be renewed at the close of all the evidence in order to be reviewable on appeal.—Rogers v. Gladiator Gold Min. & Mill. Co., S. D., 113 N. W. Rep. 86.

14.——Review.—A verdict will be sustained on appeal if it has substantial support in the evidence, though the supreme court would have arrived at a different conclusion on the facts.—Strand v. Grinnell Automobile Garage Co., Iowa, 113 N. W. Rep. 488.

15.——Theory of Case. — Where it was assumed by both parties that a general verdict for plaintiff was returned under the second count of the complaint, the first having been withdrawn by the court, the case would be determined on the same theory on appeal.—Shaw v. Pope, Conn., 67 Atl. Rep. 495.

16. **Arrest**—Custody of Prisoner.—A magistrate in whose custody a prisoner has been placed by the officer making the arrest held entitled to prevent, by the use of reasonable means, the prisoner from escaping.—Meyers v. Dunn, Ky., 104 S. W. Rep. 352.

17. **Attachment** — Amendment to Change Name of Defendant.—The affidavit and writ for attachment may be amended by change of name of defendant.—First Nat. Bank v. Gobey, Ala., 44 So. Rep. 535.

18. **Attorney and Client** — Disbarment Proceedings.—The action of a court in disbarring an attorney is judicial, but the inquiry made is in the nature of an investigation into the conduct of one of its own officers, and not the trial of an action or suit.—In re Durant, Conn., 67 Atl. Rep. 497.

19.——Presumption as to Authority of Attorney.—The entry of appearance for a defendant by an attorney is presumed to have been authorized, and to relieve himself from the effect of such appearance such defendant has the burden of proving to the satisfaction of the court that it was unauthorized.—Aaron v. United States, U. S. C. C. of App., Eighth Circuit, 155 Fed. Rep. 833.

20. **Bankruptcy**—Concealment of Books.—A bankrupt held on the evidence not entitled to a discharge on the ground that he caused his books of acount to be removed from his safe and concealed with intent to conceal his financial condition.—In re Lewin, U. S. D. C., S. D. N. Y., 155 Fed. Rep. 501.

21.——Discharge. — Where, notwithstanding testator's discharge in bankruptcy, certain claimants sought to prove their claims against his estate, the burden was on them to establish that the claims were not affected by the discharge.—Gatliff v. Mackey, Ky., 104 S. W. Rep. 379.

22.——Discharge.—A bankrupt held not debarred of the right to a discharge on the ground of fraudulent concealment of assets.—In re Winchester, U. S. D. C., W. D. Pa., 155 Fed. Rep. 505.

23.——Exemptions.—Under the law of Pennsylvania, a debtor may waive his claim to exemption, but may not assign it, and a bankrupt who has filed a formal waiver of his claim will not be permitted to withdraw such waiver for

the benefit of a single creditor to whom he has made an assignment of his claim.—In re Pfeiffer, U. S. D. C., W. D. Pa. 155 Fed. Rep. 892.

24.——Involuntary Proceedings.—A finding by a referee, confirmed by the district court, that an alleged bankrupt was not chiefly engaged in farming, but was amenable to the bankruptcy law, will not be disturbed on appeal where the evidence left the question uncertain on the facts.—Stephens v. Merchants' Nat. Bank, U. S. C. C. of App., Seventh Circuit, 154 Fed. Rep. 341.

25.——Jurisdiction.—A federal court was without jurisdiction to entertain a creditors' suit against a foreign corporation, and to appoint a receiver therein, where, at the time such suit was commenced, a petition in bankruptcy was pending against the defendant in the district of its domicile, which was afterward followed by an adjudication, and, on the facts being made known to the court, such suit will be dismissed.—Crutchet v. Red Rover Min. Co., U. S. C. C., D. Mass., 155 Fed. Rep. 486.

26.——Levy of Distress for Unpaid Rent.—Bankr. act, 1898, c. 541, secs. 67c, 67f, avoiding liens obtained through legal proceedings within four months prior to bankruptcy, do not apply to a lien obtained by a landlord by the levy of a distress warrant for past-due rent under a lease giving him such right, which was entered into in good faith and not in contemplation of bankruptcy; such lien being one which is preserved by section 67d.—In re Robinson & Smith, U. S. C. C. of App., Seventh Circuit, 154 Fed. Rep. 343.

27.——Mortgaged Property.—A mortgagee of property of a bankrupt corporation, whose debt was that of a former owner of the property, and also secured by a mortgage on other property owned by him, but which had been assumed by the corporation when it purchased the property ,held entitled to enforce his lien against the bankrupt's property for the full amount of the debt, without deducting the proceeds of the other mortgage which had been foreclosed.—In re Beaver Knitting Mills, U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 320.

28.——Partnership and Individual Debts.—Debts assumed by an individual on a purchase of property, and afterwards by a partnership of which he became a member by agreement between the partners, held provable against the partnership estate in bankruptcy.—In re Sickman & Glenn, U. S. D. C., W. D. Pa. ,155 Fed. Rep. 508.

29.——Preferences.—Evidence held to sustain a referee's finding that certain mortgagees of the bankrupt, who received their mortgages within four months prior to the filing of the bankruptcy petition, had no knowledge of the bankrupt's condition, and that this mortgagés were therefore valid, but that another mortgagee had notice of such condition, and that his mortgage therefore created an invalid preference.—In re Tindal, U. S. D. C., E. D. S. Car., 155 Fed. Rep. 456.

30.——Sale of Property.—A court of bankruptcy has jurisdiction to order a sale of property of a bankrupt upon which a lien is asserted free from such lien, and without first determining either its validity or amount.—In re Loveland, U. S. C. C. of App., First Circuit, 155 Fed. Rep. 838.

31.——Waiver of Lien—Under Bankr. Act, c. 541, sec. 57, any lien of a creditor held waived by proof and allowance of his claim without disclosure of the lien.—Dunn Salmon Co. v. Pillmore, 106 N. Y. Supp. 88.

32. **Banks and Banking**—Discount of fraudulent Note.—A bank is not chargeable with notice of fraud in the inception of a note which it discounted merely because its president had knowledge of the facts, which was gained by him in his capacity as an officer of another corporation, where he had nothing to do with the discounting of the note, and had no knowledge of it at the time.—McCalmont v. Lanning, U. S. C. C. of App., Third Circuit, 154 Fed. Rep. 353.

33.——Insolvency.—A judicial ascertainment of the liabilities of an insolvent bank, necessary before an action against stockholders, can only be had in an action where the bank being a party has been properly served or has voluntarily appeared.—Andrews v. Holcomb, Neb., 113 N. W. Rep. 204.

34. **Benefit Securities**—Insurable Interest.—One not related to insured had no insurable interest in insured's life, and his designation as beneficiary was void as against public policy.—Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n, Mich., 113 N. W. Rep. 10.

35. **Bigamy**—Burden of Proof.—Where the state showed that accused, charged with bigamy, had been married to a woman who was living at the time of his second marriage, the burden was on him to prove that the first marriage had been dissolved.—Fletcher v. State, Ind., 81 N. E. Rep. 1083.

36. **Bills and Notes**—Bona Fide Purchasers.—The naming of an officer of a corporation who executes a note ostensibl in its behalf, as the individual payee, is notice of its invalidity.—Capital City Brick Co. v. Jackson, Ga., 59 S. E. Rep. 92.

37.——Presentation by Mail.—A check negotiated at a town distant from the drawee bank may be forwarded for collection by mail either to the drawee or a third person or agent for collection.—Citizens' Bank of Pleasantville v. First Nat. Bank, Iowa, 113 N. W. Rep. 481.

38. **Boundaries**—Changes Affected by Accretion.—Where a boundary line is marked by a stream and the location of the stream is altered by erosion and accretion, it continues to be the boundary line; but, where the alteration occurs as the result of an avulsion, no change is made.—State v. Muncie Pulp Co., Tenn., 104 S. W. Rep. 437.

39. **Brokers**—Authority.—The mere employment of a broker as such only authorizes him to act as intermediary to bring the parties together ,but not to make a contract of sale.—Rowland v. Hall, 106 N. Y. Supp. 55.

40.——Right to Commission.—A broker endeavoring to sell land for his principal is bound to communicate to the principal the real facts and true situation with reference to a proposed purchase of the property.—Raleigh Real Estate & Trust Co. v. Adams, N. C., 59 S. E. Rep. 1008.

41. **Carriers**—Contributory Negligence.—A passenger who is invited by the carrier to cross a track in going to or leaving his train held chargeable only with reasonable care.—Karr v. Milwaukee Light, Heat & Traction Co., Wis., 113 N. W. Rep. 62.

42.——Delivery to Carrier.—Where goods are delivered for immediate shipment and placed in a condition to be carried at the usual place of loading with the carrier's knowledge of the fact and purpose ,there is a delivery to and accept-

ance by the carrier.—Pittsburg, C., C. & St. L. R. Co. v. American Tobacco Co. ,Ky., 104 S. W. Rep. 377.

43.——Duty to Protect Passengers.—A street car conductor held negligent toward passengers in permitting an intoxicated passenger to walk up and down the aisle while the car was in motion.—Montgomery Traction Co. v. Whatley, Ala., 44 So. Rep. 538.

44.——Redemption of Unused Tickets.—Under a statute requiring redemption of unused railroad tickets at the place of purchase, it was no defense that the person in charge of the purchase office directed plaintiff to apply for redemption at a freight depot, the location of which did not appear.—Shaw v. Chicago, R. I. & P. Ry. Co., Iowa, 113 N. W. Rep. 478.

45. **Champerty and Maintenance**—Interest of Employers' Liability Insurance Company.—The interest of an employer's liability insurance company in a personal injury action held sufficient to prevent dismissal of an appeal on the ground of champerty and maintenance.—Gelo v. Pfister Vogel Leather Co., Wis., 113 N. W. Rep. 69.

46. **Chattel Mortgages** — Possession.—In a contest for the immediate possession of mortgaged property between a mortgagee and a subsequent mortgagee and subsequent creditors, the equities of the case held to be with plaintiff the prior mortgagee.—Cable Co. v. Rathgeber, S. D., 113 N. W. Rep. 88.

47. **Commerce**—Intoxicating Liquors. — Under the commerce clause of the constitution of the United States, Acts 1906, p. 320, c. 63, prohibiting a carrier from bringing intoxicating liquors from without the state into a local option county, is void.—Cincinnati, N. O. & T. P. R. Co. v. Commonwealth, Ky., 104 S. W. Rep. 394.

48. **Constitutional Law**—Civil Remedies.—Where a statute denies a natural or artificial person an equal remedy in the law, it is void unless the remedy is given under a reasonable classification based upon certain rules which bear a just relation to the act in respect to which it is made.—Phipps v. Wisconsin Cent. Ry. Co., Wis., 113 N. W. Rep. 456.

49.——Judicial Authority and Duty.—For a court of first instance to declare unconstitutional an act of congress is an exercise of judicial power which, in cases where no great and immediate financial loss is threatening, is warranted only when the unconstitutionality exists beyond rational doubt.—International Mercantile Marine Co. v. Stranahan, U. S. C. C., S. D. N. Y., 155 Fed Rep. 428.

50.——Liberty to Contract.—Under the liberty of action guaranteed by the state and federal constitution, any one may legally refuse to maintain trade relations with another for any reason or without any reason.—Locker v. American Tobacco Co., 106 N. Y. Supp. 115.

51.——Rules of Evidence.—Revisal 1905, sec. 2060, held not unconstitutional; it being within the province of the legislature to change the rules of evidence and declare certain facts, when shown, prima facie evidence of guilt.—State v. Dowdy, N. C., 58 S. E. Rep. 1002.

52. **Contracts**—Acceptance.—Where a party to a written contract has accepted the benefit of it and acted upon it ,he is bound thereby, although he signed it in a representative capacity and not individually.—Ramsay Realty Co. v. Ramsay, Iowa, 113 N. W. Rep. 468.

53.——Baseball Player.—The provisions of the national agreement for the government of professional baseball, and the rules promulgated thereunder, giving clubs the right to reserve or sell players under contract with them, held not binding on a player hired by a contract made prior to the adoption of such agreement, and who continued to serve thereunder after such adoption.—Kelly v. Herrman, U. S. C. C., S. D. Ohio, 155 Fed. Rep. 887.

54.——Rescission.—Where a contract has been violated by the obligor ,and the obligee no longer desires that it should be performed, he may refuse to allow the contractor to perform, and, in case of suit by the contractor, may plead the breach of the contract.—Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., La., 44 So. Rep. 481.

55. **Corporations** — Bills and Notes.—A note made in the name of a corporation by its president in which he is named as payee is prima facie void as to such corporation.—Capital City Brick Co. v. Jackson, Ga., 59 S. E. Rep. 92.

56.——Contract of Directors with Company.—That directors of a corporation are personally interested in a contract made with the company, and are to a certain extent to profit by it, does not necessarily condemn the transaction. It merely calls upon them to justify it.—Teller v. Tonopah & G. R. R., U. S. C. C., E. D. Pa., 155 Fed. Rep. 482.

57——De Facto Officers.—A director who, when elected ,did not hold sufficient shares of stock to qualify him for that office, but did hold the required amount at the time an assessment was levied on the stock of the corporation was at least a de facto officer, and the assessment as against a collateral attack was valid.—Jones v. Bonanza Min. & Mill. Co., Utah, 91 Pac. Rep. 273.

58.——De Facto Officers.—A director of a corporation who has ceased to be a stockholder may continue to act as a de facto director, and his acts are not void as to third persons.—Robinson v. Blood, Cal., 91 Pac. Rep. 258.

59.——Service of Process.—A mere change of corporate name, the corporation itself remaining the same, does not necessitate the appointment of another agent to accept and receive service of process.—Cable Co. v. Rathgeber, S. D. ,113 N. W. Rep. 88.

60.——Statutory Liability of Directors.—The liability of directors of a corporation assenting to the creation of an indebtedness exceeding two-thirds of the capital stock paid in, fixed by the Vermont statute ,held enforceable only by a proceeding in equity.—Lyman v. Hilliard, U. S. C. C. of App., Second Circuit, 154 Fed. Rep. 339.

61. **Courts**—Jurisdiction of Federal Courts.—If there are several coplaintiffs, each must be competent to sue ,or, if there are several defendants ,each must be liable to be sued in a federal court to give that court jurisdiction.—Blunt v. Southern Ry. Co., U. S. C. C., S. D. Ala., 155 Fed. Rep. 499.

62.——Transfer of Cause to Appellate Court.—Where the supreme court has no jurisdiction of an appeal, it will transfer the cause to the appellate court, as expressly required by Burns' Ann. St. 1901, sec. 1337m.—Cronin v. Zimmerman, Ind., 81 N. E. Rep. 1083.

63. **Creditors' Suit**—Execution.—Under Code, sec. 4089 ,an actual levy is not necessary to bring the creditor within section 4087, authorizing a judgment creditor to bring equitable

proceedings to subject any property of the debtor to payment of the judgment.—McKee v. Murphy, Iowa, 113 N. W. Rep. 499.

64. **Criminal Evidence** — Judicial Notice.—The courts will take judicial notice that the dollar is the money unit of United States currency of the value of 100 cents, and recognize the different denominations of United States currency.—McDonald v. State, Ga., 58 S .E. Rep. 1067.

65.——Opinion Evidence.—It is not competent for the state to call non-expert witnesses from the bystanders to express their judgment, founded alone on observations made during the trial of accused on the issue of his sanity.—State v. Von Kutzleben, Iowa, 113 N. W. Rep. 484.

66.——Striking Out Nonresponsive Questions.—Where accused showed by a doctor who was attending his wife that she was unable to appear on account of illness ,it was error to permit the state to question the doctor with respect to the finding of a commission of doctors appointed by the court some three weeks before to examine the wife.—State v. Rutledge, Iowa ,113 N. W. Rep. 461.

67. **Criminal Law** — Accomplice.—A person who knew of defendant's intent to commit burglary and afterwards concealed the property stolen is not an accomplice within the rule requiring corroboration of an accomplice's testimony.—Bradley v. State, Ga., 58 S. E. Rep. 1064.

68.——Alibi.—Though an alibi be not established to the satisfaction of the jury, it must be considered with the rest of the testimony, and, if a reasonable doubt of guilt be raised, defendant must be acquitted.—Ransom v. State, Ga., 59 S. E. Rep. 101.

69. **Criminal Trial**—Commitment of Infant to Industrial School.—Where a boy found guilty of crime is committed to the industrial school, in the absence of a direct showing to the contrary ,it will be presumed on error that the court ascertained all the facts necessary to support the order.—Leiby v. State, Neb., 113 N. W. Rep. 125.

70.——Duties of Judge.—Trial judges should confine themselves to an enunciation of the law, leaving to counsel the duty of elucidating the facts and to juries the right of finding the truth.—Ford v. State, Ga., 59 S. E. Rep. 88.

71.——Stay of Execution.—A sentence is not vacated on the hearing of an application to determine the sanity of the person convicted, but the execution thereof is suspended until the day named in the order of stay.—In re Barker, Neb., 113 N. W. Rep. 197.

72. **Damages**—Life Tables.—Life tables held not admissible in an action for injury to a person who is abnormal or has an incurable disease.—Colbert v. Rhode Island Co., R. I., 67 Atl. Rep. 446.

73.——Nursing.—In an action for injuries, plaintiff is entitled to recover the value of the services of an untrained nurse, though such services were rendered by his wife.—Strand v. Grinnell Automobile Garage Co., Iowa, 113 N. W. Rep. 488.

74. **Dedication**—Intent.—To constitute a dedication of private property for a public highway, there must be an intention on the part of the owner to dedicate and an unequivocal acceptance by or on behalf of the public.—Newton v. City of Dunkirk, 106 N. Y. Supp. 125.

75. **Descent and Distribution**—Advancements.—After the death of one to whom has been made a gift or loan, the distributive share of his children, as heirs at law of the creditor or donor ,cannot without consent by diminished as charging a gift or loan as an advancement to their ancestor.—In re Hessler's Estate, Neb., 113 N. W. Rep. 147.

76. **Divorce**—Alimony.—A decree for alimony for maintenance, becoming due in the future, and payable in installments ,is not a final decree enforceable in another state, within the full faith and credit clause of Const. U. S., until the court which rendered it fixes the specific amount due.—Hunt v. Monroe, Utah, 91 Pac. Rep. 269.

77.——Defenses.—Where one party to a marriage has by her conduct caused the other to make statments to other parties based on such conduct, which if not so caused might be ground for divorce, they do not when so caused constitute such ground.—Mosher v. Mosher, N. D., 113 N. W. Rep. 99.

78. **Electricity**—Personal Injuries.—In an action for injuries by contact with a live wire, the submission of the case in such a manner that the jury might refer plaintiff's injuries to contact with either of two wires held error.—Rasmussen v. Wisconsin Traction, Light ,Heat & Power Co., Wis., 113 N. W. Rep. 453.

79. **Eminent Domain**—Rights Acquired.—The rights of the public in that portion of the land within the lines of a highway are superior to any right which the individual owner of the soil thus appropriated may undertake to assert in the use thereof.—Snively v. Washington Tp., Pa., 67 Atl. Rep. 465.

80. **Equity**—Multiplicity of Suits.—Where all the desks in controversy purchased by a school district from complainant were purchased under a single contract, and complainant's claim was allowed only in part, complainant could not maintain a suit in equity to compel payment of the full amount in order to prevent a multiplicity of suits.—Whitaker & Ray Co v. Roberts, U. S. C. C., D. Nev., 155 Fed. Rep. 882.

81. **Estoppel**—By Deed.—Where one assumes to convey property by deed he may not, to defeat his grantee's title, say that at the time of the conveyance he had no title and that none passed by the deed, nor may he deny to the deed its full effect.—Gardner v. Wright, Or., 91 Pac. Rep. 286.

82. **Evidence**—Judicial Notice as to Population of City.—The court will take judicial notice of the census showing the population of a city within the state.—Gannett v. Independent Telephone Co. of Syracuse, 106 N. Y. Supp. 3.

83. **Executors and Administrators**—Compensation.—An administrator whose appointment, though erroneous ,was not made without jurisdiction ,is entitled to reasonable compensation for services rendered by him during the time of his administration.—In re Owen's Estate, Utah, 91 Pac. Rep. 283.

84.——Sale of Real Estate.—A deed by an executrix, who was testator's widow and had a dower interest in his real property of a life estate, construed, and held to pass the fee title held by testator at his death, and not simply executrix's life estate.—Feaster v. Fagan, Iowa, 113 N. W. Rep. 479.

85. **Fire Insurance**—Unauthorized Procurement of Policy.—Where one though unauthorized procures a fire policy in the name of another, such other may ratify the assumed

agency, and assert liability against the insurer.—Todd v. German-American Ins. Co. of New York, Ga., 59 S. E. Rep. 94.

86. **Fraudulent Conveyances**—Bona Fide Purchasers.—Knowledge by assignee of a mortgage of mortgagor's purpose in executing the same to hinder and defeat a creditor does not affect his lien, where mortgagee was without knowledge of such fraudulent intent.—Shive v. Merritt, Ky., 104 S. W. Rep. 368.

87.——Payment of Liabilities.—A person who receives property from an insolvent in payment of an antecedent debt occupies a more favored position than a purchaser for a present consideration.—Jackson v. Citizens' Bank & Trust Co., Fla., 44 So. Rep. 516.

88. **Gaming** — Speculative Transactions. — Stockholders held entitled to recover from a customer the amount paid by them for certain stocks bought by the customer's direction to fill short sales previously made for him, even though the original sales were intended as merely a wagering transaction, and no deliveries were at the time contemplated.—Whittmore v. Malcomson, U. S. C. C., S. D. N. Y., 155 Fed. Rep. 503.

89. **Grand Jury**—Records.—As an item tending to establish negligence where a railroad employee was killed by a train three-quarters of a mile from a crossing held it could be shown that the crossing signal was either in open court or before the grand jury, as provided by Pen. Code, sec. 798, subd. 3.—Ziegler v. State ,Ga., 58 S. E. Rep. 1066.

90. **Highways** — Contributory Negligence.—The driver of a restive horse on approaching an automobile is not required under all circumstances to give a signal to the chauffeur to stop in order to free himself from contributory negligence.—Strand v. Grinnell Automobile Garage Co., Iowa, 113 N. W. Rep. 488.

91.——Private Use.—Abutting landowner uses passageway under highway subject to right of township to discontinue such private use when expedient.—Snively v. Washington Tp., Pa., 67 Atl. Rep. 465.

92. **Homicide**—Instructions.—Where accused was charged with assault with intent to murder ,the court properly charged that the proof must show that, if the act had resulted in death, the killing would have been murder.—Dawson v. State, Ga., 58 S. E. Rep. 1065.

93. **Husband and Wife**—Advances to Wife.—Where a husband purchases real estate for a family home, and has title placed in the name of his wife, the presumption is that it was a gift or advancement.—Van Etten v. Passumpsic Sav. Bank, Neb., 113 N. W. Rep. 163.

94.——Right ,Devise or Bequest.—In a deed the words, "by right, devise or bequest," under the rule noscitur a sociis, mean by right of inheritance, devise, or bequest, and refer to land descending by operation of law, and not to land acquired by purchase.—Dunlap v. Hill, N. Car., 59 S. E. Rep. 112.

95.——Separate Maintenance.—A wife does not forfeit her right to maintenance by refusing to live in a home under the control of her mother-in-law.—Brewer v. Brewer, Neb., 113 N. W. Rep. 161.

96. **Indictment and Information**—Requisites. —The general assembly has the right to modify old forms of bills of indictment, or establish new ones, provided in each instance the charge is sufficient to apprise the defendant with reasonable certainty of the nature of the crime.—State v. Harris, N. Car., 59 S. E. Rep. 115.

97. **Infants** — Commitment to Industrial School.—In committing a boy to the industrial school, the county court should not fix a definite and determinate sentence ,and it is sufficient if the warrant contains a statement of his residence and age.—Leiby v. State, Neb., 113 N. W. Rep. 125.

98. **Insane Persons**—Guardianship.—The husband being the natural custodian of his wife's person, extraordinary facts should be presented to warrant the appointment of a guardian for the wife when she becomes mentally unfit.—In re Andrews ,106 N. Y. Supp. 13.

99. **Judgment**—Full Faith and Credit.—The clause of the United States constitution requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, does not prevent courts from examining the records to ascertain whether or not the court of a sister state had jurisdiction of the subject matter.—Fall v. Fall, Neb., 113 N. W. Rep. 175.

100.——Pollution of Water Course.—A judgment for damages in favor of a riparian proprietor in an action against a city for the pollution of a water course by the discharge of sewage held no bar to an action to recover damages subsequently accruing from a continuance of the same acts.—Platt Bros. & Co. v. City of Waterbury, Conn., 67 Atl. Rep. 508.

101. **Judicial Sales**—Next Friend. — Infant complainants' next friend held not such a bona fide purchaser at a sale of land under the decree as to render his title good as against the owner upon a reversal of the decree.—Carroll v. Draughon, Ala., 44 So. Rep. 553.

102. **Landlord and Tenant**—Assignment of Lease.—An offer to take a lease of certain premises in case certain repairs were made, followed by an acceptance of the offer, is a separate collateral contract from the lease, which did not mention the agreement to repair and the right to repairs would not pass by the mere assignment of the lease.—Keeley Institute Co. of West Michigan v. Shaw, Mich., 113 N. W. Rep. 30.

103.——Defective Appliances.—A dumb-waiter in an apartment house held one of the facilities retained by the landlord, who thereby was charged with the exercise of reasonable care as to its condition.—Timlan v. Dillworth, N. J., 67 Atl. Rep. 433.

104.——Option to Renew.—The equity rule seeking to prevent forfeitures is not available to a lessee who seeks to enforce a renewal of a lease after omitting to exercise an option for a renewal within the time prescribed by the lease.—I. X. L. Furniture & Carpet Installment House v. Berets, Utah, 91 Pac. Rep. 279.

105. **Libel and Slander**—Privilege.—Words uttered in good faith solely to secure or preserve evidence to be used in the prosecution of a person for a crime of which the speaker was the victim are privileged.—Gill v. Powell, Ga., 58 S. E. Rep. 1051.

106. **Life Insurance**—Authority to Collect Premiums.—An agent of an insurer with authority to collect premiums has no authority to extend the time for payment of premiums, or to waive a forfeiture resulting from nonpayment.—Cayford v. Metropolitan Life Ins. Co., Cal., 91 Pac. Rep. 266.

107.——Parties to Action.—In an action to re-

cover of an insurance company testator's share of a policy, beneficiaries to whom the insurance company had paid the policy in full were not improperly made parties defendant.—Ormond v. Connecticut Mut. Life Ins. Co., N. Car., 58 S. E. Rep. 997.

108. **Mandamus**—City Council.—A petition by a telephone company to the common council held not to constitute a sufficient demand to support an application for mandamus, on its failure to act thereon, to compel the council to prescribe regulations for use of city streets.—State v. City of Milwaukee, Wis., 113 N. W. Rep. 40.

109. **Marriage**—Physical Incapability.—In a suit to annul a marriage on the ground of fraud because of the wife concealing her inability to bear children, evidence held not to show that she had knowledge of her barrenness essential to a finding of fraud.—Schroter v. Schroter, 106 N. Y. Supp. 22.

110. **Master and Servant**—Continuation After Expiration of Term.—The beginning of a new year's service without change of compensation at the end of a period of service for a year or more at a stipulated annual compensation is a new hiring for a year on the former terms.—Appleton Water Works Co. v. City of Appleton, Wis., 113 N. W. Rep. 44.

111.——Fellow Servants.—Where plaintiff and D. were employed by defendant in dismantling heavy machinery, and D. was a foreman under a superintendent, who was under a manager, held, that D. was a fellow servant of plaintiff.—Westinghouse, Church, Kerr & Co. v. Callaghan, U. S. C. C. of App., Eighth Circuit, 155 Fed. Rep. 397.

112.——Injury to Servant.—A railroad company held liable for injuries sustained in consequence of the act of a fireman wrongfully opening the valve in a locomotive boiler, causing steam to escape and injure another.—Texas & N. O. R. Co. v. Walton, Tex., 104 S. W. Rep. 415.

113. **Monopolies**—Refusal to Sell Products to Certain Persons.—A producing corporation may lawfully authorize a selling corporation to sell or refuse to sell its products to any person, and to establish the prices and terms of sale thereof.—Locker v. American Tobacco Co., 106 N. Y. Supp. 115.

114. **Mortgages**—Conditional Sales.—The doctrine of treating a conditional sale as a mortgage is the creature of equity and will not be applied, where the parties have unreasonably slept on their rights or where injustice would result.—Sheffield v. Hurst, Ky., 104 S. W. Rep. 350.

115. **Municipal Corporations**—Assessment for Benefits and Damages.—Where an assessment for benefits and damages is void, the remedy of a property owner is in equity by injunction to set aside the assessment to restrain the sale of the property and the transfer of the assessment certificates.—Spence v. City of Milwaukee, Wis., 113 N. W. Rep. 38.

116.——Defective Streets.—Where plaintiff was injured by a defective wagon scale erected in a street outside the traveled way, plaintiff was not entitled to recover from the city for the latter's failure to perform the duty he owed to him as a traveler.—O'Neil v. City of New Haven, Conn., 67 Atl. Rep. 487.

117.——Officers.—Power of council to elect officer does not exist when one who has been appointed by the mayor and confirmed by the council fails to qualify, and the incumbent may qualify anew and take the office for the succeeding term.—State v. Rosewater, Neb., 113 N. W. Rep. 206.

118.——Ordinances.—Under Acts 1896-97, p 542, giving the city of Mobile full police powers within the limits of the city, an ordinance making it the duty of the chief of the fire department to assign a fireman to all performances in any theater, who shall be paid by the manager of the theater, is within the police power of the city ,and not unreasonable.—Tannenbaum v. Rehm, Ala., 44 So. Rep. 532.

119.——Police Power.—The state may, in the exercise of its police power, require a state license for the practice of medicine, and at the same time authorize municipalities to require a license for the practice thereof within their boundaries.—City of Fairfield v. Shallenberger, Iowa, 113 N. W. Rep. 459.

120.——Smoke Ordinance.—Sanitary Code, sec. 96, punishing persons suffering smoke to escape from buildings, construed, and held not to render one liable for permitting smoke to escape from a building, which does not annoy people living in the vicinity.—People v. Sturgis, 106 N. Y. Supp. 61.

121. **Navigable Waters**—Right of Navigation.—The commerce clause of the constitution of the United States affords ample protection to the right of every citizen to free navigation of the Mississippi river, whether the current be in one state or another.—State v. Muncie Pulp Co., Tenn., 104 S. W. Rep. 437.

122. **Negligence**—Dangerous Premises.—A landowner owes to a trespasser only the duty to a licensee to use due care to prevent injury to him after his presence is or should have been known, and to an invitee the duty to keep the premises and its approaches in a safe condition.—Mandeville Mills v. Dale, Ga., 58 S. E. Rep. 1060.

123. **Nuisance**—Action for Damages.—Permanent damages to premises by a nuisance cannot be recovered, but the owners thereof may enjoin commission of the acts constituting the nuisance, and recover the temporary damages sustained therefrom.—Taylor v. Seaboard Air Line Ry., N. Car., 59 S. E. Rep. 129.

124.——Special Injury to Individuals.—A city creating a public nuisance held not liable to an individual for loss of prospective customers in consequence of the nuisance.—Liermann v. City of Milwaukee, Wis., 113 N. W. Rep. 65.

125. **Physicians and Surgeons**—License Taxes.—A city ordinance requiring a license tax of itinerant physicians does not discriminate in favor of resident and against nonresident physicians.—City of Fairfield v. Shallenberger, Iowa, 113 N. W. Rep. 459.

126. **Principal and Agent**—Authority of Agent.—An agent can only contract for his principal within the limits of his authority, and one dealing with an agent having limited powers must generally inquire as to the extent of his authority.—Swindell v. Latham, N. C., 58 S. E. Rep. 1010.

127.——Discharge of Surety.—The state receiving property under an agreement with its attorney general to release from liability a surety on a note held not entitled to retain the property, and also retain its claim against the surety.—State v. Mellette, S. D., 113 N. W. Rep. 83.

128. **Principal and Surety** — Extension of time of Payment.—An extension of the time of payment of a debt, after demand therefor, without fixing any definite period in consideration of the payment of the interest, did not constitute such an extension of the time of payment as to release one having the rights of a surety.—McCrery v. Nivin, Del., 67 Atl. Rep. 452.

129. **Railroads**—Accident at Crossing.—Proof that a child 10 years old, killed by a train at a crossing, failed to stop and look when between two tracks, is not sufficient to overthrow a general verdict for plaintiff, suing for his death.—Baltimore & O. S. W. R. Co. v. Hickman, Ind., 81 N. E. Rep. 1086.

130.——Presumption of Negligence.—A presumption of negligence arising from fire from sparks from an engine may be rebutted by proof that the company and its agents used all ordinary and reasonable care.—Southern Ry. Co. v. Thompson, Ga., 58 S. E. Rep. 1044.

131.——Right to Build Shipping Platform.—A contract by a railroad company granting the right to another to build a platform on its right of way from which to load cotton for shipment over its lines held not contrary to the public policy of the state of Alabama.—Southern Ry. Co. v. Blunt & Ward, U. S. C. C., S. D. Ala., 155 Fed. Rep. 496.

132. **Removal of Causes**—Separable Controversy.—An action of tort which may be brought against one or more persons, and which has been brought against two of them jointly, presents no separable controversy which will authorize its removal by one of them.—Blunt v. Southern Ry. Co., U. S. C. C., S. D. Ala., 155 Fed. Rep. 499.

133. **Sales**—Implied Contracts.—Where a suit was for the value of goods sold by plaintiff to defendant, and there was no allegation of an implied contract of sale, no such allegation can be inferred from the account of the goods sold being attached to the petition.—Hayward Lumber Co. v. Cox, Tex., 104 S. W. Rep. 403.

134. **Statutes** — Construction.—Where a statute has for nearly forty years been practically construed by the officers whose duty it is to enforce it, and has been re-enacted several times by the legislature in the same terms, such construction will be regarded as adopted by the legislature.—State v. Sheldon, Neb., 113 N. W. Rep. 208.

135.——Executive Proclamation.—The recitals of a governor's proclamation vetoing a bill, pertinent to an issue as to the validity of the veto, made within his province, and stating facts within his official cognizance, is record evidence, prima facie, at least, proving the facts recited.—Powell v. Hayes, Ark., 104 S. W. Rep. 177.

136. **Taxation**—Assessment.—The state board of equalization is not authorized to adopt rules reuqiring the assessment of the property of an individual in excess of its value.—Richards v. Harlan County, Neb., 113 N. W. Rep. 194.

137.——Capital Employed Within State.—Money of a foreign corporation invested in structures on leased ground in the state is capital employed within the state under the corporation tax law, although the structures may become in law the property of the owner of the ground.—People v. Wilson, 106 N. Y. Supp. 1.

138.——Failure of Tax Payer to Object to Claim.—A tax payer who has full knowledge of the allowance of a claim by the municipal authorities ,and has an opportunity to appeal, and fails to do so, cannot maintain an equitable action against the officers of the city to recover the money so disbursed.—Cathers v. Moores, Neb., 113 N. W. Rep. 119.

139. **Telegraphs and Telephones**—Use of Streets.—A telephone company having a franchise by grant of the legislature to use city streets, subject only to police regulation by the city, the city owes a duty on proper application to prescribe such regulations.—State v. City of Milwaukee, Wis., 113 N. W. Rep. 40.

140. **Torts**—Joint and Several Liability.—One electing to sue tort-feasors jointly is limited to one recovery, and he cannot have separate judgments against each.—Indianapolis Traction & Terminal Co. v. Holtsclaw, Ind., 81 N. E. Rep. 1084.

141. **Trial**—Counterclaim.—The practice in Nebraska is that an action including a counterclaim shall be tried as an entirety.—Miller v. McGannon, Neb., 113 N. W. Rep. 170.

142. **Trusts**—Action to Establish.—An action lies to establish a constructive trust and to recover the subejct thereof, where the property wrongfully obtained in specie or in its converted form remains in the possession of the wrongdoer.—Borchert v. Borchert, Wis., 113 N. W. Rep. 35.

143.——Conveyances.—A conveyance by a husband and wife of land held by a third person in trust for the wife held to pass title as against the objection that the legal title remained in the third person.—Bernheim v. Heyman, Ky., 104 S. W. Rep. 388.

144.——Rights and Remedies of Creditors.—Where income of a trust is directed to be expended by the trustees for the personal support and comfort of the beneficiary held it could not be subjected to payment of losses of his business enterprise.—Parker, Holmes & Co. v. Bushnell, Conn., 67 Atl. Rep. 479.

145.——Roman Catholic Bishop.—While a Roman Catholic Bishop is for some purposes a corporation sole, yet he is an individual, and may act as a trustee for any lawful purpose.—Rine v. Wagner, Iowa, 113 N. W. Rep. 471.

146. **Waters and Water Courses**—Mineral Waters.—An owner of land held entitled to enjoin a town from putting down a well in a street to strike a vein of mineral water supplying a well on his own land.—Hamby v. City of Dawson Springs, Ky., 104 S. W. Rep. 259.

147.——Pollution.—That a city's charter authorized it to construct sewers and condemn the property of a riparian proprietor held no defense to an action for injuries by the pollution of the water course; no part of plaintiff's property having been so acquired.—Platt Bros. & Co. v. City of Waterbury, Conn., 67 Atl. Rep. 508.

148.——Riparian Rights.—Where one riparian owner has a right to use waters of a stream subject to use of a specified quantity by an upper owner, where water is not required by one, it should be at the disposal of the other for irrigation and domestic use, when needed.—Gardner v. Wright, Ore., 91 Pac. Rep. 286.

149. **Wills**—Competency of Witness.—A beneficiary under the provisions of a will is not incompetent to testify to a conversation between testator and a third person in which witness took no part.—In re Powers' Estate, Neb., 113 N. W. Rep. 198.